IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1092 OF 2006
IN
SUIT NO.961 OF 2006

Ms.Rashmi Mehra & Ors. ....Plaintiffs.
V/s.
The EAC Trading Ltd. & Ors. ....Defendants.

Mr.S. K. Sen i/b M/s. D.H. Law Associates for the Plaintiffs.

Mr.F. E. DeVitre, Senior Counsel with Mr.Kamal Khata i/b M/s.Federal & Rashmikant for Defendant Nos.1 and 2.

Mr.M. S. Doctor i/b Kartikeya & Associates for Defendant No.3.

CORAM : S.J. VAZIFDAR,
DATED : 8TH NOVEMBER, 2006.

ORAL JUDGMENT :

1. Defendant Nos.1 and 2 have taken out this Notice of Motion for an order under Section 45 of the Arbitration and Conciliation Act, 1996, referring the disputes raised in the plaint to arbitration in accordance with the arbitration agreement contained in an Agreement to Invest dated 16.12.1994, a Shareholder's Agreement dated 16.12.1994 and a Foreign Collaboration Agreement

dated 4.4.1995.

2. The disputes arise under the said agreements as also under a buy back agreement dated 1.6.1996 as amended/modified by an agreement dated 6.12.2000. The buy back agreements do not contain an arbitration clause. The question is whether in the facts and circumstances of the case the arbitration agreements in the other agreements apply to the disputes and differences under the buy back agreement.

3. Mr.Sen opposed the Notice of Motion on the following grounds :-

I. The provisions of section 45 are not applicable in the present case as Defendant Nos.1 and 2 do not belong to contracting states as contemplated in the Act and the First Schedule thereto.

II. There is no arbitration agreement between the parties in respect of the disputes and differences raised in the plaint.

While considering the second submission it will be necessary first to decide whether a derivative action can be referred

to arbitration. I have answered this question in the affirmative. I have rejected both the grounds of challenge and allowed the Notice of Motion.

4. Defendant No.4 is the Plaintiff's husband. Plaintiff Nos.2, 3 and 4 are the daughters of Plaintiff No.1 and Defendant No.4.

Defendant No.1 is a company incorporated under the laws of Denmark. It was previously known as Bloch & Behrens ApS. It is referred to in the agreements by its previous name. Defendant No.2, GTM (Asia) Investment Holding Ltd. is a company incorporated under the laws of the British Virgin Islands. Defendant No.3 Global Wool Alliance Pvt. Ltd., (previously known as Mehra Wool Alliance Pvt. Ltd.) is incorporated under the Companies Act, 1956. The Plaintiffs and Defendant Nos.1 and 2 are shareholders of Defendant No.3.

Defendant Nos.4 to 7 are/were the Directors of Defendant No.3.

5. The suit is filed as a derivative action in respect and on behalf of Defendant No.3 as well as for the Plaintiffs personal reliefs. The derivative action is on the basis that Defendant Nos.1 and 2 are

in control of Defendant No.3, who have mala-fide not taken any action to enforce the rights of Defendant No.3, inter-alia, including to claim compensation. The cause of action regarding the personal reliefs is based on the allegation that Defendant Nos.1 and 2 induced the Plaintiff to inter-alia enter into contracts to reduce their shareholding and to expand the capacity of Defendant No.3 by misrepresentation and fraud with the intention of gaining control of Defendant No.3.

Re : SUBMISSION I :

The provisions of section 45 are not applicable in the present case as Defendant Nos.1 and 2 do not belong to contracting states as contemplated in the Act and the First Schedule thereto.

6. This submission is based on the presumption that there exists a valid arbitration clause in respect of the subject matter of the suit. The arbitration clauses in the three agreements are as under :-

(i). Clause 15 of the Agreement to Invest :

> "15. ARBITRTION
>
> Any dispute or difference arising out of or in relation to this Agreement or any

obligation set out herein, which cannot be settled by mutual negotiations, shall be resolved by arbitration. The arbitration shall be conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce, Paris. The arbitration shall be held in London, England. This arbitration agreement and the arbitration proceedings shall be governed by English Law. For the removal of doubt, it is clarified that such arbitration shall not be regarded s an arbitration under the Indian Arbitration Act, 1940."

(ii). Clause 17 of the Shareholders Agreement :

"17. ARBITRATION

Any dispute or difference arising out of or in relation to this Agreement or any obligation set out herein, which cannot be settled by mutual negotiations, shall be resolved by arbitration. The arbitration shall be conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce, Paris. The arbitration shall be held in London, England. This arbitration agreement and the arbitration proceedings shall be governed by English Law. For the removal of doubt, it is clarified that such arbitration shall not be regarded as an arbitration

under the Indian Arbitration Act, 1940."

(iii). Foreign Collaboration Agreement :

"7. Arbitration

Any dispute or difference arising under or in connection with this Agreement which cannot be settled by friendly negotiations and agreement between the parties shall be finally settled by Arbitration to be held in London under the rules of the International Chamber of Commerce. The law governing the arbitration proceedings will be the law of the forum where the arbitration will be held."

7. Sections 44 and 45 of the Arbitration and Conciliation Act, 1996 read as under :-

44. Definition.—In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—

(*a*) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(*b*) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

> 45. Power of judicial authority to refer parties to arbitration.—Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (V of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

8. Mr.Sen submitted that the agreement must be one to which the convention applies. The present agreements do not come within the scope of section 45 as, according to him, the parties thereto do not belong to territories declared by the Central Government by notification in the Government Gazette, to be territories to which the convention applies. Defendant No.1 is incorporated in Denmark and Defendant No.2 is incorporated under the laws of the British Virgin Islands. The British Virgin Island at least is not a reciprocating territory. The submission is not well founded.

9. Firstly, it must be noted that section 44 specifies what a "foreign award" means. In addition to it being an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after 11th October, 1960 two further

requirements are necessary viz. (i) the award must be in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies and, (ii) it must be made in one of such territories as the Central Government declares by notification in the Official Gazette, to be a territory to which the said convention applies.

10. Section 45 stipulates the requirements for a judicial authority when seized of an action to refer the parties to arbitration. The section stipulates that the action must be in a matter in respect of which the parties have made an agreement referred to in section 44. (As observed earlier, for the purpose of this submission I have proceeded on the basis that such an agreement exists.) Further the reference should be made at the request of one of the parties. This condition too is satisfied by virtue of the present application having been filed by Defendant Nos.1 and 2, requesting for a reference, referring the parties to arbitration. This is subject only to the agreement being found by the judicial authority to be null and void, inoperative or incapable of being performed. With this reservation/limitation, we are not concerned in the present matter. It

is not the Plaintiff's case that the agreements for arbitration are null and void, inoperative or incapable of being performed.

11. Thus, in the present matter, the question of applicability of section 45 is limited to a consideration of whether in respect of the subject matter of the suit the parties have made an agreement, referred to in section 44.

Section 45 does not require the existence of the conditions referred to in section 44(b). It naturally cannot, for section 44(b) deals with a situation after the award is made whereas, section 45 deals with the position prior to even the reference being made.

12. This leads to a consideration of whether the differences between the parties hereto pertain or are pursuant to an agreement in writing for arbitration, to which the convention set forth in the First Schedule applies. The answer, I find, must be in the affirmative having regard to Article II of the First Schedule which is as follows :

"Article II

1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.

> 2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

13. Incidentally the title to the First Schedule and the New York Convention - “CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS” – is restrictive and limited as the Convention/First Schedule also deals with and provides for the recognition and enforcement of arbitration agreements. This is clear for instance from Article II (3) reproduced earlier. This aspect has also been recognised in Law and Practice of International Commercial Arbitration, Alan Redfern and Martin Hunter, Third Edition, page 455, 10-24.

14. An analysis of Clause 1 of Article II indicates three requirements viz.

i) An agreement in writing;

ii) The parties having undertaken under the agreement to submit to arbitration all or any differences which have arisen or may

arise between them in respect of a defined legal relationship and ;

iii) The differences concern a subject matter capable of settlement by arbitration.

There is no dispute that these requirements are fulfilled in the present case. The only contention on behalf of the Plaintiffs is that the Applicants (Defendant Nos.1 and 2) do not belong to countries which are contracting states.

15. Article II however does not require a Contracting State to recognise such an agreement only if all the parties thereto belong to Contracting States. Nor was my attention invited to any provision in the Act which mandates such a requirement. To reiterate, Section 45 incorporates only clause (a) and not clause (b) of Section 44.

16. It is pertinent to note that a Contracting State may limit the applicability of the convention to the recognition and enforcement of awards made only in the territory of another Contracting State. The First Schedule does not contemplate such a limitation in respect of arbitration agreements. In respect of arbitration agreements, a Contracting State may apply the convention only qua the nature of differences viz. to those considered commercial under the national

law of such State. As far as the agreement for arbitration is concerned, section 44 (a) and correspondingly section 45 of the Act do not limit the recognition or enforcement of the arbitration agreement qua the nationality of the parties. Indeed the Convention/First Schedule to the Act does not contemplate such a limitation qua arbitration agreements.

17. This interpretation of section 44(a) read with section 45 and Article II of the First Schedule is supported by contrasting the provisions thereof on the one hand with section 53 of the Act and clause 1 of the Second Schedule thereto on the other.

Section 53 deals with the Geneva Convention Awards and reads as under :-

> **53. Interpretation.—**In this Chapter "foreign award" means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924,—
>
> (*a*) in pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and
>
> (*b*) between persons of whom one is subject to the jurisdiction of some one of such powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official

Gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the powers aforesaid, and

(*c*) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies,

and for the purposes of this Chapter an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

Clause 1 of the Second Schedule reads as under :-

> "1. Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.
>
> Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations in order that the other

> Contracting States may be so informed." (emphasis supplied)

18. The present case is covered by section 44 as an award, if made would be one after 11.10.1960, Section 53 applies to cases after 20.7.1924 but before 11.10.1960.

19. Clause 1 of the Second Schedule contemplates the recognition of an arbitration agreement *"between parties, subject respectively to the jurisdiction of different Contracting States"*. This provision is absent in the First Schedule, which is based on the New York Convention. In fact, this is a distinction which has been noted in the Law and Practice of International Commercial Arbitration, Alan Redfern and Martin Hunter, page 68, 1-20 where, it is observed :

> "Unlike the Geneva Protocol of 1923, the New York Convention does not provide that the parties to an arbitration agreement to which the Convention applies shall be "subject respectively to the jurisdiction of different contracting states".

20. It is thus clear that where the provisions of Section 45 apply it is not necessary that the parties should be subject respectively to the jurisdiction of different contracting states. Mr.Sen's submission is therefore rejected.

21. Mr.Sen referred to Article XIV of the First Schedule in support of his contention. Article XIV reads as under :

> “Article XIV
>
> A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.”

22. Whatever be the ambit of Article XIV, it certainly does not support Mr.Sen's submission. The Article deals with the Contracting States and not parties belonging to Contracting States. Mr.Sen submitted that the expressions in Article XIV, “A Contracting State” and “other Contracting States”, ought to be read as “A party belonging to a Contracting State” and “parties belonging to other Contracting States” respectively. Accordingly, he further submitted that the term “it” refers to the former party viz. “a party belonging to a Contracting State”. This is neither permissible nor warranted.

23. Article XIV pertains to the Contracting States applying the convention. The Contracting States are not bound to apply the convention in its entirety. They are entitled to limit the applicability of the convention as provided in the convention itself. Article XIV prescribes a limitation upon the Contracting States availing the

convention against other Contracting States. The limitation being the extent to which the Contracting States availing of the convention is itself bound to apply the convention.

24. Article XIV of the First Schedule read as it is and not as suggested by Mr.Sen, is not meaningless. The submission is based on the erroneous presumption that Contracting States themselves do not enter into arbitration agreements with other Contracting States. The presumption is unfounded. There is nothing in the Act which suggests that Governments of Contracting States cannot enter into an arbitration agreement or that the Act is inapplicable to such arbitration agreements. In fact, the Act contemplates the Government of a foreign country being a party to an arbitration agreement. This is clear from section 2(f) of the Act which reads as under :-

> **2. Definitions**.—(1) In this Part, unless the context otherwise requires,—
>
> (*f*) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—
>
> (*i*) an individual who is a national of, or habitually resident in, any country other than India; or

(*ii*) a body corporate which is incorporated in any country other than India; or

(*iii*) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

(*iv*) the Government of a foreign country;
(emphasis supplied)

25. Mr.Sen relied upon a judgment of the Supreme Court in *Ramji Dayawala & Sons (P.) Ltd. v. Invest Impor, (1981) 1 SCC 2085.* Section 3 of the Arbitration (Protocol and Convention) Act, 1937 fell for consideration of the Supreme Court. Paragraphs 32 and 33 read as under :-

> "32. India and Yugoslavia have ratified the protocol. The question, however, is whether Section 3 is attracted in this case. The important expression in Section 3 to be noted is: "If any party to a submission made in pursuance of an arbitration agreement to which the protocol set forth in the First Schedule as modified by the reservation subject to which it was signed by India applies". This expression postulates an agreement to which the protocol set forth in the First Schedule as modified by the reservation subject to which it was signed by India applies and a submission made in pursuance of such agreement. Now, both India and Yugoslavia have ratified the protocol modified by the reservation subject to which it was signed by India. It may be assumed that arbitration agreement between the parties to this appeal is governed by the 1937 Act. Section 3 is, however, not attracted merely where an

agreement as set forth in the First Schedule is subsisting between the parties but the next step ought to have been taken before proceeding can be stayed in exercise of the power conferred by Section 3 viz. submission made in pursuance of such an agreement. A reference to Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961, ("1961 Act" for short), prior to its amendment by the amending Act of 1973 and a decision of this Court interpreting the expression: "If any party to a submission made in pursuance of an agreement to which" would clearly establish that mere existence of an agreement as envisaged by the First Schedule would not attract Section 3 of the 1937 Act but it would only be attracted where there is a submission pursuant to that agreement. Section 3 of the 1961 Act prior to its amendment in 1973 read as under:

> "*Stay of proceedings in respect of matter to be referred to arbitration.*— Notwithstanding anything contained in the Arbitration Act 10 of 1940 or in the Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an agreement to which the Convention set forth in the Schedule applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance or before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings and the Court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between

> the parties with regards to the matter agreed to be referred, shall make an order staying the proceedings.
>
> "But in the present case a suit is being tried in the courts of this country which, for the reasons already stated, cannot be stayed under Section 3 of the Act in the absence of an actual submission of the disputes to the arbitral tribunal at Moscow prior to the institution of the suit."

"33. Section 3 of 1937 Act is in pari materia with Section 3 of 1961 Act. It, therefore, becomes crystal clear that Section 3 of the 1937 Act would only be attracted if there is a submission pursuant to an agreement to that effect. In fact, the decision in *V/0 Tractoroexport, Moscow*[10], made it necessary for the Parliament to amend Section 3 of the 1961 Act. In this case we are concerned with Section 3 of the 1937 Act which is not amended. It must, therefore, receive the same interpretation which an identical provision received at the hands of this Court. Viewed from that angle, in this case while there is an agreement as contemplated by First Schedule to 1937 Act, there is no submission made in pursuance of such agreement and, therefore, the application of the respondent could not have been entertained under Section 3 of the 1937 Act. As far as the 1961 Act is concerned, Mr.Majumdar conceded that Yugoslavia has not ratified the protocol pursuant to which 1961 Act was enacted and, therefore, the respondent cannot maintain its application under Section 3 of

the 1961 Act." (emphasis supplied)

26. In paragraph 32, the Supreme Court observed that both India and Yugoslavia had ratified the protocol and, therefore, assumed that the arbitration agreement between the parties was governed by the 1937 Act. The question before me is whether it is also necessary for the applicability of section 45 that the Plaintiff must belong to a Contracting State. This question was neither raised before nor considered by the Supreme Court. Secondly, the last sentence in paragraph 33 of the judgment makes it clear that counsel had conceded that Yugoslavia had not ratified the protocol pursuant to which the 1961 Act was enacted and that therefore the Respondent could not maintain its application under section 3 of the 1961 Act. The judgment makes it clear that the point was neither argued nor fell for consideration. As Mr.Sen also fairly agreed, the sentence recorded counsels concession. It cannot therefore constitute ratio. As recorded in paragraph 31 of the judgment, the only contention that was raised was based on the 1937 Act and not on the 1961 Act.

27. One of the conditions to constitute an arbitral award, a foreign award, within the meaning of section 44 is that it should be

made in one of such territories as the Central Government by notification in the Official Gazette, declares to be a territory in which the Convention applies. There is no such requirement qua an agreement for arbitration in section 44(a) and correspondingly in section 45. To uphold Mr.Sen's contention, would require section 45 to be rewritten by inserting after the words, “the parties”, the words “which belong to a Contracting State”. Section 45 read with the First Schedule, is clear. It would therefore be impermissible in any event to read into section 45 such a limitation.

28. Accordingly Mr.Sen's first submission is rejected.

Re. : SUMISSION II

There is no arbitration agreement between the parties in respect of the disputes and differences raised in the plaint.

28. Accordingly Mr.Sen's first submission is rejected.

29. The next contention raised on behalf of the Plaintiff is that there is no arbitration agreement in respect of the disputes and differences in the suit.

Mr.DeVitre on the other hand contended that the disputes

and differences are covered by the aforesaid arbitration agreements contained in the Agreement to Invest, the Shareholder's Agreement and the Foreign Collaboration Agreement. He submitted that the buy back agreements are also covered by the arbitration agreements contained in the said agreements. This was based on two grounds. Firstly, he submitted that the buy back agreement is impliedly, if not expressly, a part of the agreement to invest and the shareholder's agreement. In any event, he submitted that the subject matter of the buy back agreement and the disputes and differences in relation thereto are inextricably inter-linked. The agreements constituted, according to him, but a single package. They are a suite of agreements.

30. It is necessary first to determine the approach to be adopted by the Court in considering an application under Section 45. Mr.DeVitre relied upon the judgment of the Supreme Court in *Shin-Etsu Chemical Co. Ltd. v. Akash Optifibre Ltd. & Anr., (2005) 7 Supreme Court Cases, 234* in support of his submission that the Court under an application under section 45 is required to take only a prima-facie view on the objections raised to an application under section 45. The

submission is well founded in view of the observations of the majority judgments delivered by Srikrishna J. and Dharmadhikari J. Paragraphs 72, 99 and 107 of the judgment delivered by Srikrishna J. read as under :-

> "72. True, that there is nothing in Section 45 which suggests that the finding as to the nature of the arbitral agreement has to be *ex facie* or *prima facie*. In my view, however, this is an inescapable inference from an *ex visceribus* interpretation of the statute. Sub-section (3) of Section 8 in Part I of the Act envisages that even in a situation where an application to the court has been made under sub-section (1), the arbitration may commence, continue and even an arbitral award be made. This was obviously meant to cut down delay in the conclusion of the arbitral proceedings. There is conspicuous absence of a corresponding provision either in Section 45 or in the rest of the provisions in Part II. This legitimately gives rise to an inference that once the arbitral agreement has been subjected to scrutiny before the court under Section 45 of the Act, conceivably, the arbitral proceedings could be stayed till the decision of the court on the nature of the arbitral agreement. If it were to be held that the finding of the court under Section 45 should be a final, determinative conclusion, then it is obvious that, until such a pronouncement is made, the arbitral proceedings would have to be in limbo. This evidently defeats the credo and ethos of the Act, which is to enable

expeditious arbitration without avoidable intervention by the judicial authorities."

"99. In my view, this is a clear and unequivocal expression on the part of the court on the issue before us. Indeed, the Ontario Court has clearly held that the court in the matter of interpretation of the existence and non-vitiation of the arbitral agreement has only a *prima facie* jurisdiction and is not required to render a final decision at that stage."

"107. For all these reasons, I respectfully differ from the judgment of my esteemed Brother Sabharwal, J. I am of the view that the present matter needs to be remitted to the trial court, but not for a full trial as directed by the impugned judgment of the High Court. The application under Section 45 would have to be determined by the trial court after arriving at the *prima facie* satisfaction that there exists an arbitral agreement, which is "not null and void, inoperative or incapable of being performed". If the trial court finds thus, the parties shall be referred to arbitration." (emphasis supplied)

Dharmadhikari J. concurring with the above view in paragraph 111 held as under :-

111. With utmost respect to both of them, I am inclined to agree with the view expressed by learned Brother Srikrishna, J. but only with a rider and a partly different reason which may I state below:

The main issue is regarding the scope of power

of any judicial authority including a regular civil court under Section 45 of the Act in making or refusing a reference of dispute arising from an international arbitration agreement governed by the provisions contained in Part III Chapter I of the Act of 1996. I respectfully agree with learned Brother Srikrishna, J. only to the extent that if on a prima facie examination of the documents and material on record including the arbitration agreement on which request for reference is made by one of the parties, the judicial authority or the court decides to make a reference, it may merely mention the submissions and contentions of the parties and summarily decide the objection if any raised on the alleged nullity, voidness inoperativeness or incapability of the arbitration agreement. In case, however, on a prima facie view of the matter, which is required to be objectively taken on the basis of material and evidence produced by the parties on the record of the case, the judicial authority including a regular civil court, is inclined to reject the request for reference on the ground that the agreement is "null and void" or "inoperative" or "incapable of being performed" within the meaning of Section 45 of the Act, the judicial authority or the court must afford full opportunities to the parties to lead whatever documentary or oral evidence they want to lead and then decide the question like trial of a preliminary issue on jurisdiction or limitation in a regular civil suit and pass an elaborate reasoned order. Where a judicial authority or the court refuses to make a reference on the grounds available under Section 45 of the Act, it is necessary for the judicial authority or the court which is seized of the matter to pass a reasoned order as the same is subject to appeal to the appellate court under Section 50(1)(*a*) of the Act and further appeal to this Court under sub-section (2) of the said section.

31. It would be convenient to consider Mr.Sen's contentions qua the prayers and the corresponding averments in the plaint in

respect thereof.

Prayer (a) reads as under :

> (a) This Hon'ble Court be pleased to declare the agreements dated the Agreement to invest and Shareholders Agreement both dated 16th December, 1994, as valid, subsisting and binding on the Defendant Nos.1, 2 & the said IFU;

32. Prayer (a) is clearly covered by the arbitration agreements in the agreement to invest and the shareholder's agreement. There was no real dispute regarding the same.

33. Prayers (b) to (f), which according to Mr.Sen, are the reliefs based on the derivative action read as under :-

> (b) a mandatory order and direction from this Hon'ble Court, directing the Defendants No.1 to supply greasy wool each month to the Defendant No.3 company for combing, and to pay conversion charges of 30 per Kilogram therefor;
>
> (c)In the alternative to prayer (b) the Defendant No.1 do pay Rs.7.5 crores to the Defendant No.3 each month and month to month thereafter as per the particulars of claim Ex. "M-2";
>
> (d) That this Hon'ble Court do direct

> the Defendant No.2 to purchase 75% of the production of the Defendant No.3 company and to pay the price calculated as per the agreed format;
>
> (e) In the alternative, the Defendant No.2 do pay US Dollars 300,000 to the Defendant No.3 each month and month to month thereafter as per the particulars of claim Ex. “M-2”;
>
> (f) the Defendants No.1 and 2 be directed to pay to the Defendant No.3 an amount of Rs.58.50 crores as set out in particulars of claim being Exhibit “M” by way of loss and damages caused to the company until date;

34. The derivative action no doubt pertains substantially to the alleged breaches under the buy back agreements dated 1.6.1996 and 6.12.2000. The averments are inter-alia in paragraphs 26 to 29, 32, 36 and 38 of the plaint. Essentially, the grievance is that Defendant Nos.1 and 2 failed to honour the commitments under the buy back agreements as a result whereof Defendant No.3 suffered losses and consequently had to reduce its share capital. In 2003-04 the chairman, who belonged to the Defendant No.1 group of companies, wrongly decided to curtail the wool combing production. This, according to the Plaintiff, was contrary to the buy back

agreement. It is also alleged that sound financial practices had not been followed by Defendant Nos.1 and 2 in the management and running of Defendant No.3. The alleged initial starving of Defendant No.3 of raw-materials resulted in further losses being incurred by Defendant No.3.

35. The first question that arises is whether a derivative action is maintainable in arbitration. My attention has not been invited to any judgment on this point. I must decide it therefore on principle.

36. The general rule is that it is for the corporation to sue in its own name and individual shareholders cannot assume to themselves the right of suing in the name of the Corporation. To this is the exception permitting shareholders to file derivative actions. It is founded on the basis that the company being managed by miscreant directors or shareholders will not institute proceedings for protecting or enforcing the rights of the company. The person filing the derivative action must show that the company has the right to sue but will not do so on account of it being managed by miscreant directors or shareholders

37. While deciding the question of the maintainability of a derivate action in arbitration it is essential to note some of the essential features of a derivate action. Though a derivative action is filed in the name of the shareholder it is for the benefit of the company. The company is joined as a co-defendant. Most important, the reliefs if obtained enure to the benefit/credit of the company and not of the person bringing the derivative action. When bringing a derivative action to assert the rights of a company under a contract the person bringing the action is entitled to rely upon and enforce the contract in the same manner and to the same extent that the company itself could have. This is an obvious corollary to the aforesaid features of a derivative action.

38. There is nothing to my mind that suggests that the arbitration agreement contained in such an agreement, stands on a different footing. The person who brings the derivative action invokes the arbitral clause not for himself but for and on behalf of the company. The action though not in form by the company is for all intents and purposes an action by and for and on behalf of the company. The person bringing the derivate action is therefore equally

not only entitled to invoke but bound by, the arbitration clause qua the action. Obviously this will not be so qua the personal reliefs claimed. Thus seen there is no reason why a derivative action cannot be brought in arbitration proceedings.

39. This of course is provided the claim is arbitrable. If a claim cannot be referred to arbitration obviously a derivate action cannot be referred to arbitration. In other words on the question of arbitrability a derivative action stands on the same footing as the claim before a Court/tribunal or other judicial authority. For instance a derivative action on a question of tenancy cannot be brought in arbitration.

40. A view to the contrary could frustrate arbitration agreements entered into by companies by the simple expedient of having a shareholder bring a derivative action. This could obviously easily be done by the company. It could also be done equally easily by the other contracting party either through an existing shareholder or by having a nominee acquire shares and bring such an action. Either party could thereby frustrate arbitration agreements to which a company is a party.

41. This brings me back to Mr.Sen's submission regarding the existence of an arbitration agreement with respect to the buy back agreement.

42. It is true that the buy back agreement does not contain an arbitration clause. As I shall presently demonstrate, this, in fact, supports the present application.

43. The buy back agreements are not independent, stand alone agreements. Nor are they entered into pursuant to the agreement to invest and the shareholder's agreement. The buy back agreements are not merely connected with or relate to, but form an integral part of and stand merged with the Agreement to Invest and the Shareholder's Agreement. They are, in fact, the substratum, the sole purpose and the root of these agreements. This is clearly established from the provisions of the agreements and from the averments in the plaint itself.

44. It is necessary to first set out the clauses of the said agreements before correlating them with the facts that establish what I have said.

45. **Agreement to Invest :**

The agreement to invest dated 16.12.1994 was entered into between Plaintiff No.1, Defendant No.1 (in its earlier name - Bloch & Behrens ApS and is referred to therein as “B&B”) Defendant No.2 and “The Industrialization Fund for Developing Countries ” (I.F.U.). The following recitals and clauses therein are relevant :-

> “Whereas RM, GTM, and B&B have entered into a Memorandum of Understanding on May 19th 1994 for the setting up of a joint venture public limited company in the State of Maharashtra, which shall be engaged in the processing and marketing of wool and other textile related products as more particularly described in the Project Report, Appendix 1;”
>
> “Whereas RM has already taken steps to incorporate a private limited company with the intended name Mehra Wool Alliance Private Ltd. (hereinafter referred to as “the Company”);”
>
> “3. SHARE CAPITAL
>
> 3.1 The authorised capital of the Company shall be Rs.153.250.000.
>
> 3.2 Immediately upon the Closing Date and subject to Clause 2;
>
> (a) GTM, IFU and B&B shall

each subscribe to and pay for by a foreign inward remittance and the Company shall issue and allot to GTM, IFU and B&B 1953937 equity shares of Rs.10/- each at par.

(b) RM shall subscribe to and pay for in cash and the Company shall issue and allot to RM 1953937 equity shares of Rs.10/- each at par.

(c) The parties shall each nominate one member to the Board. The Board shall then forthwith hold a meeting where amended Memorandum and Articles of Association of the Company shall be adopted and where such other business shall be transacted in order to make the Company operational.

3.3 All shares shall be of the same class and shall be alike in all respects, and the holders thereof shall be entitled to identical rights and privileges including, without limitation, rights and privileges with respect to divided, voting rights and the distribution of assets in the event of voluntary or

involuntary liquidation, dissolution or winding up of the Company. The Shareholders' Agreement imposes certain rights and obligations on the Parties with regard to their shares in the Company."

3.4 At such time as the Parties may agree and as recommended by the Bank the Parties will cause the Company to offer 7,509, 252 shares of Rs.10/- each at par to the general public less such shares to be offered to the employees as per 3.6. The Parties have agreed to entrust the Bank to manage this issue, on terms as set forth in Appendix 4."

"5. OTHER AGREEMENTS

5.1 .....

5.2 In order for the Company to establish the plant contemplated in Appendix I the Parties agree that the Company through its Board shall enter into the following :

(a) A contract with a main contractor for the construction of the plant and all works connected

herewith.

(b) Contract or contracts for purchase of machinery and equipment and installation thereof.

(c) Contract with B&B for supply of technical assistance and transfer of know-how regarding securing of wool covering both during the construction of the plant and subsequent operation thereof.

(d) Contract with GTM for supply of technical assistance and transfer of know-how regarding spinning and weaving during the construction of the plant and subsequent operation thereof.

(e) Such other contracts as are considered necessary by the Board."

46. **Shareholder's Agreement Dated 16th December, 1994 :**

(a). The shareholder's agreement was entered into between Plaintiff No.1, Defendant No.1, Defendant No.2 and I.F.U.

(b). The first recital of the shareholder's agreement refers to the agreement to invest, according to which, the parties thereto were

to take steps to become shareholders of Defendant No.3 with the intended name Global Wool Alliance Pvt. Ltd., i.e. the present name. The second recital reads as under :-

> "Whereas RM, GTM, IFU and B&B desire to set forth herein certain agreements they have reached to govern their relationship as shareholders of the Company."

(c). The following clauses are relevant :-

> "1. INTERPRETATION
>
> 1.1. .....
>
> "Control" (including "control by") means the possession, direct or indirect of the power to direct or cause the direction of the management and politics of a business entity, whether through ownership or voting securities, by contract or otherwise;"
>
> "2. ORGANIZATION AND BUSINESS OF THE COMPANY
>
> 2.1 Unless otherwise mutually agreed the business of the Company shall be as described in the Agreement to Invest.
>
> 2.2 The Memorandum of Association and Articles of Association of the Company shall

incorporate such provision contained in the Agreement to Invest and this Shareholders' Agreement as must be included therein to have legal effect under applicable India law."

"4. MANAGEMENT OF THE COMPANY

4.1 Board of Directors

(a) The Board shall consist of 4-6 Directors. Initially the Directors shall be :

Mr.Prem K. Mehra
Mr.George Gu
Mr.Jan Edw. Ditlevsen
Mr.Martin Kristensen

(b) Following an issue of shares to the general public as contemplated in the Agreement to Invest the Parties shall hold the following portions of the Share Capital :

RM	12.75 pct
GTM	12.75 pct
IFU	12.75 pct
B&B	12.75 pct

(c) So long as the Parties own Shares in the Company they shall cooperate in order to secure that the four Directors are nominated by the Parties.

(d) In the event there is any change in the proportion of the Shares owned by the respective Parties this Shareholders' Agreement shall be amended so as to ensure that the party owning the highest number of Shares shall have a proportionately greater influence on the

nomination of candidates to the Board.

(e) The right to nominate a Director shall include the right to remove any such Director and to appoint another in his/her place and to fill any vacancy of such Director.

(f) .....

(g) .....

(h) The Parties agree to use their voting rights to effectuate the aforesaid system or appointment, election and removal of Directors described above."

4.2 Responsibility of Board, Chairman and Managing Director

"13 PREFERENCE BY GTM AND B&b

Provided that the Company can offer competitive quality, service and pricing B&B shall favourably consider using the Company on a commission basis as its preferred supplier to fill B&B's requirements for production of combed wool. Similarly GTM shall favourably consider using the Company to fill GTM's requirements for textile products."

47 (a). **Foreign Collaboration Agreement dated 4th April,1995 :**

The foreign collaboration agreement was entered into between Plaintiff No.1, Defendant No.1, Defendant No.2 I.F.U. and Defendant No.3 (in its previous name - Mehra Wool Alliance Pvt. Ltd.

and referred to in the foreign collaboration agreement as "the Company"). Recital "A" expressly refers to the Agreement to Invest. Clause 1 of the agreement specified the initial issued and paid up capital of the Company. Plaintiff No.1, Defendant Nos.1 and 2 and IFU each held 25% of the equity share capital. Clause 1 further provided :

> "The Parties agree at all times to maintain the above shareholding pattern upto the issue of shares to the public as stipulated hereinafter."

Clause 3 provided as did the Agreement to Invest, for the public issue of the shares of Defendant No.3. Clause 4 provides that each of the parties to the agreement would hold 12.75% of the equity shares of Defendant No.3 after the public notice.

(b). Each of the supplemental foreign collaboration agreements referred to certain changes in the name, the authorised share capital and the shareholding pattern of Defendant No.3, as and when the same had occurred. Suffice it to state that eventually Plaintiff No.1 admittedly holds only about 2.5% of the equity shares of Defendant No.3. Clause 5 of the supplementary foreign collaboration agreements dated 14.7.1995 expressly provided that all of the

provisions of the foreign collaboration agreement dated 4.4.1995 will continue to operate between the parties without any modification or alteration.

48. **Buy Back Agreement dated 1st June, 1996 :-**

The buy back agreement dated 1.6.1996 was entered into

between Defendant No.1 and Defendant No.3. Clauses 1 and 6 of the agreement read as under :-

> "The Company (Defendant No.3) agrees to comb on commission work greasy wool supplied by B&B (Defendant No.1) and return the combed tops and by – products such as Noils, Card Waste and Burrs to them. The Company will charge consolidated combing charge per kg inclusive of clearance of their consignment from the docks and putting the processed tops and by products on the vessel. The freight from the Bombay Port to the destination however be borne by B&B"

Clause 2 pertains to the procedure for giving effect to the agreement. Clauses 3 and 4 pertain to the price and payment. The agreement does not contain an arbitration clause. The first recital however refers to the shareholder's agreement and the agreement to invest. The second recital reads as under :-

> "b) The Company has been organised as a JVC in pursuance of the SA & AI. B&B has agreed to use combed wool top manufacturing capacity of the company."

Clause 1 inter-alia provides that Defendant No.1 had agreed to utilise a certain percentage of the increased combing capacity of Defendant No.3. The agreement also provides the procedure to be adopted, the price and the mode of payment. Clause 6 of the agreement reads as under :-

> "**6. Validity :**
>
> This Agreement shall remain valid as long as B&B continues to be a shareholder in the company or otherwise determined by mutual consent."

49. The opening part of clause 5.2 of the Agreement to Invest itself establishes that the provisions thereof are expressly to establish the plant contemplated in Appendix-I. Clause 5.2(e) provides that the parties thereto agree that Defendant No.3 shall for that purpose enter into "such other contracts as are considered necessary by the board".

50. By clause 13 of the Shareholder's Agreement, Defendant No.1 agreed to favourably consider using Defendant No.3 as its

preferred supplier in respect of its requirements of production of combed wool provided Defendant No.3 would offer competitive servicing and pricing. Similarly, Defendant No.2 agreed to favourably consider Defendant No.3 in respect of its requirements for textile products.

51. It is true that clause 13 opens with the words “provided that the company can offer competitive quality servicing and pricing .....”. In the facts and circumstances of the case, however, prima-facie, at least, clause 13 was not merely an agreement to enter into an agreement. As I said earlier, the buy back agreement was the substratum, the very basis and the sole purpose for which these agreements were entered into. This, in turn, is established inter-alia, by the following averments in the plaint itself.

(i). Paragraphs 7 and 8 of the plaint contain averments regarding the interest of Plaintiff No.1 and Defendant No.4 in setting up the plant for the production of the said goods and the desire for foreign participation in marketing the same. After stating that the Plaintiff and Defendant No.4 incorporated Defendant No.3, they further state that Defendant Nos.1 and 2 expressed their intention to

participate in the proposed unit. It is thereafter averred as follows in paragraph 8 :-

> "8. ..... The Defendant Nos.1 & 2 wished to utilize the expertise of the Defendant No.4 in producing wool based material for repurchase and sale in Europe. The Defendant Nos.1 & 2 proposed that they would supply wool to the 3rd Defendant company for processing and pay a conversion price. The Defendant Nos.1 & 2 represented that they would invest in the company and utilize the full capacity of the company for diverse wool processing operations and buy back the entire production of the 3rd Defendant company. Accordingly, the 3rd Defendant company was registered as a 100% Export Oriented Unit ("EOU") and was statutorily bound to comply with export requirements." (emphasis supplied)

(ii). After setting out the provisions of the agreement to invest, the Plaintiffs state as follows :-

> "The parties further agreed to use the Plaintiff's company Mehra Wool Alliance Pvt. Ltd. for the joint venture and to invest therein." (emphasis supplied)

(iii). Prima-facie therefore despite the wording of clause 13, the buy back agreement was agreed to. In other words clause 13 does not establish that the parties had merely agreed to enter into a buy back agreement.

52. Clause 6 of each of the buy back agreements dated

1.6.1996 and 6.12.2000 provide that the buy back agreement shall remain valid as long as Defendant No.1 continues to be a shareholder in Defendant No.3 or otherwise determined by mutual consent. Thus, subject to the buy back agreement being determined by mutual consent, it was to remain valid as long as Defendant No.1 continued to be a shareholder.

53(i). The very first recital to the Agreement to Invest itself refers to the parties thereto having entered into an MOU on 19.5.1994 for setting up Defendant No.3 which was contemplated to be engaged in the processing and marketing of the goods described in the project report annexed as Appendix-I thereto. The appendix was not annexed to the plaint but was tendered in Court.

(ii). The project report was prepared by the Plaintiffs husband, Defendant No.4, Prem Mehra. The project report which was prepared prior to the said agreements, indicates quite clearly that the entire project was founded upon the buy back arrangement. The following extracts from Appendix-I are relevant in this regard :-

> "<u>Promoters</u>
>
> ".....
> "Foreign partner from Europe, apart from

> contribution to equity capital will help in buying quality wool from their expert buying organisation in Australia and New Zealand. They will also get their greasy wool converted into tops for the export market. They have well established sales outlets all over the world.
>
> Foreign partner from Far East will enter into a buy back arrangement for yarn, grey fabrics and finished fabrics produced by the unit. They are well established in marketing polywool finished fabrics in Far East, U.S.A. And Canadian markets." (emphasis supplied)

(iii). Apart from containing details about the manufacturing process, location, machinery and tax implications, the project report also contains detailed financial data in the notes and assumptions on which the project was based. For instance, the clauses in the notes and assumption include the charges to be levied for the work in respect of the said goods.

54. The doubt, if any, in this regard is set at rest by the following averments in paragraphs 12 and 17 of the plaint :-

> "12. The project was based on active participation of all partners with responsibilities as follows:
>
> a. The Plaintiffs Group was to implement the project and look after the production base.

b. The Defendant No.1 was to supply raw wool for combing to the Defendant No.1 and to buyback total wool combing production.

c. The Defendant No.2 to buyback the company's grey fabric production."

"17. In furtherance of the representation of Defendant No.1 to buy back the entire production of the company, the company and the Defendant No.1 entered into an agreement dated 1st June 1996 whereunder the Defendant No.1 was to fully utilize the company's combed wool top manufacturing capacity."

55. It is thus clear from the above that the buy back agreement was indeed the basis of the entire arrangement/transaction comprised in the aforesaid agreements. Indeed, if the buy back agreement was not to be entered into, the entire venture would have been still born. It was never in the contemplation of the parties that the buy back agreement would not be entered into. The aforesaid facts establish not merely the fact that the buy back agreements were not merely connected with the other agreements but formed an integral and an inalienable part thereof. It was therefore unnecessary for the parties to provide an arbitration clause in the buy back agreement.

56. It is true that Defendant No.3 is not a party to the

agreements other than buy back agreements, in terms. That to my mind, in the facts and circumstances of the present case, would make no difference. There was an obligation under clause 13 of the shareholder's agreement to enter into the buy back agreement. Prima-facie, in view of the aforesaid facts and circumstances, it appears that clause 13 was not an agreement to enter into an agreement. It constituted not merely an essential but the fundamental term of the agreement. The mere fact that Defendant No.3 did not execute the agreement or was not named as a party to the agreement, itself would make no difference once it is held that the buy back agreements formed an integral part of the agreement to invest and the shareholder's agreement. By implication, the terms and conditions thereof get incorporated into the buy back agreement. The buy back agreement being a part of the Agreement to Invest and the Shareholder's Agreement, the terms and conditions thereof apply to the buy back agreement.

57. That the buy back agreement forms an integral part of the agreement to invest and the shareholder's agreement, is established on a conjoint reading of clause 5.2 of the agreement to invest and

clause 13 of the shareholder's agreement. The opening part of clause 5.2 in fact and in substance indicates that it is the company itself albeit through its Directors that has agreed to enter into such other contracts as are considered necessary. I have already indicated how the buy back agreement was not only necessary but formed the fundamental basis of the entire arrangement between the parties. Indeed, it is for this reason that the cause of action pleaded in the plaint pertaining to the breach of the said agreements is made applicable by the Plaintiffs even in support of the derivative action.

58. Defendant No.3 has no objection to the disputes and differences being referred to arbitration in accordance with the aforesaid arbitration agreements. The concerned Respondents have made a statement that they will not object to the maintainability of the arbitration proceedings on the ground that a derivative action cannot be referred to arbitration. It is clarified however that they will be entitled to challenge the maintainability of the derivative action per-se by the Plaintiffs before the Arbitrators just as they are entitled to in this suit.

59. Article (6) of the ICC Rules authorises the arbitrators to

decide their own jurisdiction.

60. Mr.DeVitre further submitted that in any event the disputes and differences which formed the cause of action for the derivative action had a sufficiently close connection to the Agreement to Invest, the Shareholder's Agreement and the Foreign Collaboration Agreement. Therefore, he submitted the arbitration clauses in the said agreements would cover the disputes and differences arising out of the buy back agreement. In support of this contention, he relied upon the judgment of the Supreme Court in *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan & Ors., (1995) 5 Supreme Court Cases, 650*. In view of what I have held it is not necessary to consider this submission.

61. It must therefore be held that the disputes and differences pertaining to the derivative action are covered by the arbitration clauses contained in the other agreements.

62. Prayer (g) reads as under :-

> (g) the Defendants No.1 and 2 be directed to pay to the Plaintiffs an amount of Rs.58.50 crores as set out in particulars of claim being Exhibit “M-1” on account of the loss and damages caused to the Plaintiffs by

> the illegal actions of the Defendants No.1 and 2;

63. Prayer (g) clearly falls within the scope of the shareholder's agreement. This is in view of what I have already held. Further, the allegations regarding the speculative transactions and other financial transactions pertain clearly to the responsibility of the board, the chairman and Managing Director of Defendant No.3 as contained in clause 4 of the shareholder's agreement and, in particular, clauses 4.2 and 4.3 (f)and (s) thereof.

64. It is pertinent to note the averments in paragraph 41 of the plaint in this regard. The Plaintiff's contention therein is that Defendant Nos.1 and 2 had an obligation not only to Defendant No.3 but also to the Plaintiff under the shareholder's agreement inter-alia, to act in the manner most beneficial to Defendant No.3 as well as to its shareholders and that Defendant Nos.1 and 2 committed a breach of their obligation under the shareholder's agreement.

Thus, the allegations pertain to the breach by Defendant Nos.1 and 2 of their obligations under the shareholder's agreement which admittedly contains an arbitration clause.

65. Prayers (h) to (k) read as under :-

(h) This Hon'ble Court do declare that, the Agreements, G", "H" and "K" as also the 5th Supplemental Foreign Collaboration Agreement dated 1st October, 2000 are vitiated by fraud and/or misrepresentation and are not binding upon the Plaintiffs and/or the Defendant No.3;

(i) The Hon'ble Court do order and direct the Defendant Nos.1 & 2 to deliver up the agreements at Exhibits "G", "H" and "K" as also the 5th Supplemental Foreign Collaboration Agreement dated 1st October, 2000 for cancellation;

(j) This Hon'ble Court do direct the Defendants to forthwith make a public issue from their shareholding so that the Plaintiff and the Defendant Nos.1 & 2 have equal shareholding i.e. 12.75%;

(k) In the alternative, the Defendant Nos.1 & 2 be ordered and directed to transfer such shares to the Plaintiff so as to ensure that the Plaintiffs have equal shareholding as the Defendant Nos.1 & 2, i.e.25%;

66. With reference to prayers (h) to (k), they pertain to a challenge to the foreign collaboration agreements. The main supplementary collaboration agreement dated 4.4.1995 contains an arbitration clause. Clause 7 of the foreign collaboration agreement

contains an arbitration agreement. Each of the supplementary collaboration agreements are merely modifications thereto. In fact, clause 5 of the supplemental foreign collaboration agreement dated 14.7.1995 expressly provides that all the provisions of the foreign collaboration agreement dated 4.4.1995 will continue to operate among the parties without any modifications or alterations.

67. The reliefs in this regard are based inter-alia on the allegations in paragraphs 19, 23 and 30 of the plaint. In paragraph 19, the Plaintiff has alleged that they required further capital for expansion; that it was decided that Defendant Nos.1 and 2 and the said IFU would infuse the required further capital and that it was decided not to make an initial public offer in view of the then prevailing market conditions. It is further averred that Defendant Nos.1 and 2 pointed out that if in future the public issue of shares was to be made and that since the parties were still bound by the aforesaid agreements, Defendant nos.1 and 2 also represented that upon the public issue, the holding of each of the parties would be restored as contemplated under the Agreement to Invest and the Shareholder's Agreement. Accordingly, the Plaintiff's case is that it was always

agreed and understood that the reduction in the share capital was only temporary till the public issue of the shares was made.

These disputes clearly fall within the arbitration clause in the Shareholder's Agreement and/or the Agreement to Invest.

68. Prayer (l) reads as under :-

> (l) the purported Notice purportedly dated 22nd February, 2006 for Extra Ordinary General Meeting scheduled for 10th March, 2006 be set aside;"

Prayer (l) does not survive as the entire process has been completed.

69. Thus, without expressing any conclusive view on the matter, I reiterate that I am prima-facie of the opinion that there exists a valid arbitration agreement in respect of the disputes and differences between the parties raised in this suit.

70. In the circumstances, the Notice of Motion is made absolute in terms of prayer (a). The Plaintiffs shall pay the costs of this Notice of Motion fixed at Rs.10,000/- within twelve weeks from today.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1092 OF 2006
IN
SUIT NO.961 OF 2006

DATE OF DECISION : 8TH NOVEMBER, 2006

The Hon'ble Mr. Justice S. J. Vazifdar

1. Whether to be referred to the Reporters or not ?)

2. Whether the Reporters of Local Papers)

may be allowed to see the Judgment ?)